IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27218-4-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LUIZ CRUZ-MARTINEZ,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, A.C.J. — Luiz Cruz-Martinez[1] appeals his first degree child molestation conviction. He argues that there was prosecutorial misconduct during the State's opening and that the victim's testimony was improperly bolstered by testimony from the arresting officer and a child welfare worker. Mr. Cruz-Martinez also contends the court abused its discretion by allowing the State to submit evidence of hearsay statements for the purpose of showing inconsistencies and by admitting a videotape of an interview between the victim and a child welfare worker. Finally, Mr. Cruz-Martinez asserts he received ineffective assistance of counsel at trial. We reject Mr. Cruz-Martinez's assertions and

[1] For the purposes of this opinion, we will use the spelling that appears on the information.

affirm his conviction.

FACTS

Alberta Big Wolf is the mother of three children. At the time of the trial in April 2008, Nathaniel was eight, Angel was six, and Loretta was five. Mr. Cruz-Martinez is Angel's father.

In July 2007, Ms. Big Wolf asked Mr. Cruz-Martinez to watch the children while she went shopping. When Ms. Big Wolf left the house, Nathaniel was sleeping on the couch, Loretta was playing a video game in Nathaniel's bedroom, and Angel was in her bedroom.

Later, Nathaniel woke up and saw Mr. Cruz-Martinez run out the door. Nathaniel went to check on his sisters. Loretta was playing a game in Nathaniel's bedroom. Nathaniel asked Loretta if she was okay, and she said, "yeah." Report of Proceedings (Apr. 15-17, 2008) (Trial RP) at 295. Angel was in her bedroom. Nathaniel called his mother on a cell phone.

The Big Wolf home is a mobile home. There are three bedrooms. The door to Nathaniel's bedroom did not have a door knob, so Nathaniel usually used a towel to plug the hole in the door. He could not remember whether there was a towel in the door that day. There is no record of a connecting door between Ms. Big Wolf's bedroom and

Nathaniel's bedroom.

The day following the incident, the girls approached Ms. Big Wolf and Loretta told her that Mr. Cruz-Martinez "humped her." Trial RP at 305. Loretta stated that Mr. Cruz-Martinez had been on top of her, kissing her chest. Loretta also stated that this hurt and she could not breathe.

Ms. Big Wolf contacted police, and Officer Michael Morrison conducted an investigation. Loretta told him that Mr. Cruz-Martinez took off his pants and "started to hump me." Trial RP at 405. She also said that Mr. Cruz-Martinez put his "pee pee" on her "pee pee." Trial RP at 405. Loretta told Officer Morrison that Mr. Cruz-Martinez kissed her neck and chest and asked her, "you want to do it." Trial RP at 405. According to Loretta, Mr. Cruz-Martinez also put his "pee pee" inside of her and it hurt.

Loretta and Angel were placed in foster care with Kelly Brown. Loretta told Ms. Brown that Mr. Cruz-Martinez was bad and humped her. Loretta also stated that Mr. Cruz-Martinez put lotion on his "dick," and then she pointed to her vagina. Trial RP at 350. Loretta said that Mr. Cruz-Martinez climbed on her and moved up and down.

Ms. Big Wolf never heard Loretta use the word "dick." Instead, Loretta always referred to her privates as "pee pee." Trial RP at 331. Loretta learned the word "humping" from a cousin. Trial RP at 308.

Loretta was examined by Delores Dolgner, a nurse practitioner. Ms. Dolgner found no signs of trauma. Loretta told Ms. Dolgner that one time Mr. Cruz-Martinez put his "pee pee" on her and then pointed to her vaginal area. Trial RP at 340.

Tiffany Picking, a child welfare worker with Children and Family Services, interviewed Loretta in July 2007 and February 2008. During the July interview, Loretta told Ms. Picking that Mr. Cruz-Martinez got on top of her and humped her. Loretta demonstrated with her fingers that "humping" was similar to rubbing. Trial RP at 420. Loretta also reported that both she and Mr. Cruz-Martinez were clothed. Loretta stated that she was wearing a shirt and "chummies," underwear, and that Mr. Cruz-Martinez had pulled his pants down but was wearing his shirt and underwear. Trial RP at 420.

During the February interview, Loretta was less forthcoming and did not want to respond to questions about the incident. However, when Ms. Picking mentioned Mr. Cruz-Martinez's name, Loretta stated that he "humped" her. Trial RP at 426. Loretta also reported that there was no skin-to-skin touching.

In November 2007, Mr. Cruz-Martinez was charged with first degree child molestation. The court held a combined child hearsay and competency hearing. The court determined that Nathaniel and Angel were competent to testify. Loretta's competency was not decided, pending her testimony at trial. The court ruled that

Loretta's statements to Ms. Picking were admissible because they were nontestimonial, but that Loretta's statements to Officer Morrison were not admissible because they were testimonial. The court also ruled that RCW 9A.44.120 did not apply to Angel's statements and that they were inadmissible if they were made to someone else. The court noted that Angel's statements corroborated what Loretta told other people.

In her opening, the deputy prosecutor told the jury that Mr. Cruz-Martinez took Loretta's panties off and that there was skin-to-skin touching.

During her testimony, Loretta did not remember being touched on her "pee pee." Trial RP at 217-18. She did not remember any touching on her body. Loretta did not remember where Mr. Cruz-Martinez may have touched her. She did not know the meaning of the word "dick," and she denied using this word. Trial RP at 221. Loretta stated that Mr. Cruz-Martinez pulled down his pants and got on top of her while she was lying on her back. Loretta said that the incident occurred in Nathaniel's bedroom.

Angel testified that she saw Mr. Cruz-Martinez get on top of Loretta. Angel saw this when looking through the hole in Nathaniel's bedroom door while she was in her mother's bedroom. Angel said that Mr. Cruz-Martinez was fully clothed except that the zipper in his pants/belt was open. Angel said that Mr. Cruz-Martinez was "humping" Loretta. Trial RP at 240. Angel testified that the incident occurred in the morning, but

Loretta testified that the incident occurred in the afternoon.

Ms. Brown was allowed to testify concerning Angel's statement that Mr. Cruz-Martinez had molested her. Defense counsel did not object. Officer Morrison was allowed to testify, without objection, to statements made by Angel. The testimony of Ms. Brown and Officer Morrison was contrary to the court's earlier order that Angel's statements were hearsay and testimonial in nature.

The court allowed the State to play a videotape of Ms. Picking's February interview with Loretta. Defense counsel objected to the videotape on the basis that it was outside the scope of the cross-examination.

Mr. Cruz-Martinez denied any sexual contact with Loretta or any other child.

During deliberations, the jury submitted two notes to the court. The first note advised that the jury was seriously deadlocked. The court asked the jury to continue deliberations. The second note requested an opportunity to view the videotape of Loretta's February interview. The court responded that the jury could not see the videotape again.

The jury found Mr. Cruz-Martinez guilty as charged. This appeal followed.

ANALYSIS

Admission of Child Victim and Child Witness Statements. Mr. Cruz-Martinez asserts that the prosecuting attorney committed misconduct by violating the court's pretrial rulings by asking Ms. Brown about Angel's statements and when Officer Morrison testified about both Angel's and Loretta's statements. Mr. Cruz-Martinez also argues that his counsel's failure to object to this testimony compounded the violation of Mr. Cruz-Martinez's confrontation rights.

Loretta's Statements. RCW 9A.44.120 states, in part:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child . . . .
>
> (a) Testifies at the proceedings.

In its pretrial rulings, the court determined that Loretta's statements to Officer Morrison were testimonial and inadmissible. Specifically, the court found:

> 23. If an out of court statement is "testimonial" in nature *and the declarant is unavailable to testify at trial*, the State cannot introduce the statement as evidence unless the defendant has had an opportunity to cross-examine the out-of-court declarant. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177, 187 (2004);
>
> 24. The Court finds that the statement [Loretta] made to Officer Morrison was testimonial in nature, and thus the State will not be permitted to introduce this statement at trial.

Clerk's Papers (CP) at 40 (emphasis added).

The court concluded that the testimonial statements would be suppressed if Mr. Cruz-Martinez was not afforded the opportunity to cross-examine Loretta. In other words, the statements made to the officer were inadmissible unless the victim testified at trial. Here, the victim, Loretta, testified at trial, giving the opportunity for cross-examination. Hence, her statements complied with RCW 9A.44.120 and were admissible. The court's conclusion of law 24 is based on the assumption that Loretta would not testify.

Mr. Cruz-Martinez contends the State's argument that Loretta's testimony at trial rendered inadmissible evidence admissible is disingenuous. To support his position, Mr. Cruz-Martinez relies on conclusion of law 6, which states:

> [Loretta] may also testify at the upcoming trial, however, it is unknown at this time if [Loretta] will be able to testify regarding details of the incident in question and thus, the Court reserves a ruling on whether or not she is "unavailable" pursuant to RCW 9A.44.120.

CP at 37. Rather than support Mr. Cruz-Martinez's position, conclusion of law 6 indicates that the findings and conclusions were not based on the assumption that Loretta would testify.

Loretta's statements to Officer Morrison and Ms. Brown are admissible under

RCW 9A.44.120.

Angel's Statements. In its pretrial rulings, the court concluded that RCW 9A.44.120 was not applicable to Angel's statements because Angel was not the victim. Specifically, the court found:

> 8. Thus, absent a showing by the State that such hearsay statements are otherwise admissible, statements made by [Angel] regarding this incident to other parties are not admissible.

CP at 37.

However, Ms. Brown was allowed to testify concerning a statement made by Angel that Mr. Cruz-Martinez had also molested her. Officer Morrison was also allowed to testify as to statements made by Angel.

Defense counsel elicited the testimony concerning Angel's statements to Ms. Brown. There was no objection by defense counsel. Likewise, defense counsel did not object when the State introduced the testimony of Officer Morrison concerning Angel's and Loretta's testimony. Mr. Cruz-Martinez asserts that the State's introduction of Officer Morrison's testimony, along with defense counsel's failure to object, adversely impacted Mr. Cruz-Martinez's right to a fair and impartial trial under the Sixth Amendment and his right to effective assistance of counsel.

Defense counsel's failure to make a proper objection at the time may be

raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). To raise an error for the first time on appeal pursuant to RAP 2.5(a)(3), the error must be "manifest" and truly of constitutional dimension. *State v. WWJ Corp*., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" *WWJ Corp.*, 138 Wn.2d at 603 (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The testimony concerning Angel's statements constituted hearsay. However, the introduction of this testimony, and defense counsel's failure to object, did not adversely impact Mr. Cruz-Martinez's confrontation rights because Angel testified at trial.

In summary, Loretta's statements to Ms. Brown and Officer Morrison are admissible under RCW 9A.44.120. Mr. Cruz-Martinez failed to object to Ms. Brown's and Officer Morrison's testimony as to Angel's statements, and Angel testified at trial. Thus, Mr. Cruz-Martinez failed to preserve this error for review on appeal.

Loretta's Statements to Ms. Picking. Mr. Cruz-Martinez contends Loretta's

statements to Ms. Picking are inadmissible under RCW 9A.44.120. Mr. Cruz-Martinez challenges conclusions of law 29 and 30, which read as follows:

> 29. Although the Court finds that the statements of Tiffany Picking are certainly more formal than a child talking to his or her parents or relatives in the home, the Court concludes that the interviews of Tiffany Picking are not testimonial in nature as it does not appear that [Loretta] would have expected that such statements would be used for the purposes of trial; and
> 30. Furthermore, the Court considered the fact that Ms. Picking presented herself to [Loretta] as someone who was concerned about her safety and her purpose was to ensure she was safe and as such, the statements are admissible at trial.

CP at 41. A challenge to the trial court's conclusions of law is reviewed de novo. *State v. Horrace*, 144 Wn.2d 386, 392, 28 P.3d 753 (2001).

Mr. Cruz-Martinez bases his argument on *State v. Hopkins*, 137 Wn. App. 441, 154 P.3d 250 (2007). *Hopkins* is distinguishable because the child victim in *Hopkins* did not testify.

RCW 9A.44.120 states, in part:

> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child . . . .
> (a) Testifies at the proceedings.

The court in *Hopkins* found that the child did not testify at trial and that the child was

"unavailable as a witness" under RCW 9A.44.120(2)(b). *Hopkins*, 137 Wn. App. at 448-49. The court also noted that

> *if on remand the trial court finds M.H. competent to testify at [Mr.] Hopkins' retrial, the* Crawford *issue would be moot.* [Mr.] Hopkins would have an opportunity to cross-examine her at trial. Even if M.H. cannot recall and relate her previous allegations of [Mr.] Hopkins' sexual assault when she was two-and-a-half years old, her being called as a witness at trial, subject to questioning about the event, would satisfy both the Sixth Amendment and subsection (2)(a) of RCW 9A.44.120.

Id. at 452 (emphasis added).

Here, the court found that there was corroboration for Loretta's statement, especially in the testimony of Angel. The court determined that the "statements would be admissible under the *Ryan*[2] factors and under the statute if they get past *Crawford*." RP (Feb. 15, 2008) at 128. Under *Crawford*, "[t]estimonial statements of witnesses *absent* from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59 (emphasis added). "Testimonial" is defined as "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 52.

The court also concluded that Ms. Picking's testimony was nontestimonial. The

[2] *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

court based this decision on the fact that Ms. Picking told Loretta that she was concerned for Loretta's safety. The court found a difference between Ms. Picking's task and the task of a uniformed officer conducting an investigation. However, regardless of whether the statements were testimonial or nontestimonial, they were admissible because Loretta testified at trial.

Loretta's statements to Ms. Picking were admissible.

Improper Bolstering. A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006).

Mr. Cruz-Martinez argues that Ms. Brown's testimony and Officer Morrison's testimony bolstered Loretta's testimony. Mr. Cruz-Martinez asserts that Ms. Brown's and Officer Morrison's testimony was inadmissible under ER 801(d)(1)(ii) because it was consistent with Loretta's testimony. The State argues that the testimony was inconsistent and, therefore, did not bolster Loretta's statements.

Mr. Cruz-Martinez makes his bolstering argument under ER 801(d)(1)(ii). However, statements deemed admissible under the child hearsay statute need not be evaluated as possible nonhearsay. But these statements are subject to exclusion under ER 403. Under ER 403, the child's statement is inadmissible if "'its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *State v. Bedker*, 74 Wn. App. 87, 93, 871 P.2d 673 (1994) (quoting ER 403).

Importantly, Ms. Brown's testimony concerning Angel was elicited by defense counsel. Ms. Brown testified that Angel told her that, "he did it to me too, yeah." Trial RP at 367. However, in earlier testimony, Angel stated that she viewed the incident through a door. Defense counsel clearly elicited the later statement from Angel for the purpose of showing inconsistencies in Loretta's and Angel's statements, not consistencies. Moreover, because defense counsel elicited this statement, and because Angel testified at trial, Mr. Cruz-Martinez has failed to preserve this error on appeal.

Loretta's statements to Officer Morrison were also inconsistent. Two days after the incident, Loretta indicated to Officer Morrison that Mr. Cruz-Martinez kissed her chest and neck. Loretta also told Officer Morrison that Mr. Cruz-Martinez took his pants off, humped her, and put his pee pee inside of her. At trial, Loretta denied being touched on her pee pee and did not remember where Mr. Cruz-Martinez may have touched her. Loretta's statements to Officer Morrison demonstrated inconsistencies, not bolstering.

Similarly, Ms. Picking testified that during the July interview, Loretta told her that

there was no skin-to-skin contact because Loretta was wearing a shirt and underwear and Mr. Cruz-Martinez was wearing underwear and a shirt. Loretta told Ms. Brown that Mr. Cruz-Martinez removed her clothes and panties. Loretta also told Ms. Brown that Mr. Cruz-Martinez had humped her many times; but during the February interview, Loretta testified that he had humped her one or two times. Ms. Picking testified that during the July interview, Loretta did not tell her that Mr. Cruz-Martinez had kissed her upper body or that he had put lotion on his penis. Ms. Brown's testimony does not bolster Loretta's testimony.

Loretta's statements were admissible under RCW 9A.44.120. Loretta's testimony was not bolstered by the admission of testimony from Officer Morrison, Ms. Brown, or Ms. Picking. Instead, Loretta's statements contained inconsistencies which were not merely repetitive but which were probative of the questions before the jury. And, in any event, "the admission of merely cumulative evidence is not necessarily prejudicial error." *State v. Dunn*, 125 Wn. App. 582, 589, 105 P.3d 1022 (2005).

Admission of Videotape. As stated above, we review a trial court's admission of evidence for an abuse of discretion. *Nelson*, 131 Wn. App. at 115.

On direct examination, Ms. Picking was questioned about the February interview, which did not have a transcript, and the July interview, which did. When questioned, Ms.

Picking could not remember what Loretta's response to one question had been at the February interview. On cross-examination, defense counsel asked questions concerning the July interview and the February interview.

The State then asked permission to play the entire 25 minute videotape of Ms. Picking's February interview with Loretta. Defense counsel argued that the admission of this videotape went beyond the scope of cross-examination. The court allowed the jury to view the videotape of the February interview. The court explained that the videotape was "helpful and admissible evidence." Trial RP at 446. Under the court's ruling, the jury was not allowed to view the videotape during deliberations.

Mr. Cruz-Martinez argues that the court erred by admitting the videotape as a consistent statement under ER 801(d)(1)(ii),[3] but the court's ruling is not clear from the record. The court stated that:

> I think this is a somewhat difficult area to evaluate and I don't know whether this exposes or more closely shows additional inconsistencies or apparent inconsistencies that have been discussed or whether it tends to—[defense counsel's] point, weld the testimony into the jurors' minds but a great deal of the trial has been what did [Loretta] say? What did [Loretta] say to him?

[3] Prior consistent statement offered to rebut an express or implied charge of recent fabrication, improper influence, or motive.

Trial RP at 445-46.

ER 801(d)(1)(ii) is not applicable here because Loretta's statements are admissible under RCW 9A.44.120. However, Mr. Cruz-Martinez's arguments appear to raise questions under ER 403. Loretta's statements are inadmissible if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. The videotape is particularly helpful because it provided the jury with visual and audio information that went beyond the mere repetition of statements. And as the trial court explained, a central question was "what did [Loretta] say?" Trial RP at 446. Viewed in this context, the videotape was not repetitious or cumulative. The court did not abuse its discretion by admitting the videotape.

Because we find the videotape admissible under RCW 9A.44.120 and ER 403, the court need not address the State's arguments that defense counsel opened the door to the videotape or that the videotape was admitted for purposes of refreshing Ms. Picking's recollection.

Prosecutor Misconduct During Opening. A prosecutor's opening statement should consist of a brief statement of the issues, an outline of the anticipated material

evidence, and reasonable inferences to be drawn from that evidence. *State v. Kroll*, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976). Testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The court has wide discretion in determining the good faith of the prosecutor. *State v. Lyskoski*, 47 Wn.2d 102, 107, 287 P.2d 114 (1955). "The defendant bears the burden of 'establishing both the impropriety of the prosecutor's conduct and its prejudicial effect.'" *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)).

Mr. Cruz-Martinez argues that the prosecutor lacked independent, corroborating evidence when she told the jury there was skin-to-skin touching and that Mr. Cruz-Martinez removed Loretta's panties. According to Mr. Cruz-Martinez, this conduct demonstrated that the State believed that it could not prove the crime of first degree child molestation.

The prosecutor had a good faith belief that there would be testimony as to skin-to-skin touching and the removal of Loretta's panties. During an interview a few days after the incident, Loretta told Officer Morrison that Mr. Cruz-Martinez put his pee pee inside her. During the July interview, Loretta told Ms. Picking that Mr. Cruz-Martinez removed her panties. In addition, Mr. Cruz-Martinez fails to show that the prosecutor's conduct

was in bad faith.

Ineffective Assistance of Counsel. To succeed on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that, except for counsel's representation, the result would have been different. *McFarland*, 127 Wn.2d at 334-35. The court must presume that counsel's conduct was the result of trial tactics. *Brett*, 126 Wn.2d at 198.

Defense counsel was not ineffective for failing to object to the out-of-court statements. The defense's theory of the case was based on Loretta's prior inconsistent statements. Defense counsel argued that Loretta's feelings about Mr. Cruz-Martinez were planted by someone else and that Loretta told inconsistent statements. Defense used this strategy to discredit the victim and other witnesses. Mr. Cruz-Martinez failed to show that his counsel's representation at trial was deficient.

We affirm the conviction for first degree child molestation.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, A.C.J.

WE CONCUR:

_____ _____

Brown, J. Korsmo, J.